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No. 91-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether intrastate trucking transportation that is "integral to" the operation of a federally certificated national air cargo system is protected from state regulation under the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), which applies to "any air carrier" that is federally certificated.

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BRIEF IN OPPOSITION

STATEMENT

The Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1301 *et seq.*, preempts state regulation of federally certificated air carriers, including those that exclusively provide air cargo services. Respondent Federal Express is a covered air cargo company that uses an integrated system of planes and trucks to transport packages throughout the country. The district court held that, notwithstanding the ADA, petitioner, the California Public Utilities Commission ("CPUC"), is free to separate out and regulate Federal Express's transportation of packages that move only by truck and only in California.

The court of appeals reversed, concluding that "[t]he trucking operations of Federal Express are integral to its operation as an air carrier." Pet. App. A.5.[1]

1. The ADA provides that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier [that is federally certificated]." 49 U.S.C. App. § 1305(a)(1). Among the certificated air carriers covered by this provision are those that provide air cargo services. The ADA makes clear that, in furtherance of the "public interest," such carriers should operate an "integrated transportation system" (*id.* § 1302(a)(2)), relying on planes *and* trucks to ensure point-to-point delivery from business to business and home to home. Indeed, one of the stated goals of the ADA is to promote the "encouragement and development of an expedited all-cargo air service system." *Id.* § 1302(b)(1).

2. Federal Express is, as the court of appeals observed in this case, "exactly the kind of an expedited all-cargo service that Congress specified [in the ADA] and the kind of integrated transportation system that was federally desired." Pet. App. A-7. Federal Express operates "one of the largest airlines in the United States" (*id.* at A-2); it also uses trucks to move packages to and from its facilities and airports, thereby enabling the company to provide door-to-door delivery throughout the country by 10:30 a.m. the day following pick-up. The entire system is built around the use of a "hub and spoke" airplane operation: Federal Express trucks pick up packages at offices, homes, and drop boxes nationwide and transport them to the company's airport facilities, where they generally are flown either to Federal Express's national sorting hub or to one of its two regional hubs; the packages are then usually again transported by

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[1] Respondent Federal Express has no parent corporation or nonwholly owned subsidiaries. *See* Sup. Ct. R. 29.1.

plane to airports throughout the country, where they are placed on trucks for delivery to their final destination.

Because Federal Express's air cargo "system operates as an integrated whole, a delay of even one half-hour at an airport may affect thousands of packages." *Id.* at A-3. As a result, scheduling decisions necessarily require maximum flexibility so that Federal Express is able to deal with a large variety of day-to-day exigencies that can have system-wide effects on a regional, if not national, basis. In California, for example, a package going from a business office in San Francisco to one in Los Angeles is trucked to the Federal Express regional hub at the airport in Oakland. From there, the package may move to Los Angeles in one of three ways: (1) it may be flown there directly; (2) it may be flown to Memphis—Federal Express's main hub—and then to Los Angeles; or (3) it may be trucked to the Los Angeles airport. Once a package arrives at the airport in Los Angeles, it is then trucked to its point of delivery. When Federal Express picks up any such package, it does not know by which of these three routes it will be transported. That decision is made at the sorting hub in Oakland and "depends on air traffic, control delays, weather, aircraft availability, and the volume of packages in the entire system." *Id.* at A-3. Consequently, a Federal Express customer in San Francisco uses the same air bill, is charged the same price, and receives the same money-back guarantee of a 10:30 a.m. delivery, regardless of how its package is actually moved.

At the time that this case was heard in the district court, Federal Express had been transporting an average of approximately 650,000 packages nationwide on a daily basis, the vast majority of which were delivered, sorted, and re-routed through the Memphis hub. Of that number, just over 11% moved out of California and almost 15% moved into California. About 3.7% of Federal Express's total number of packages both originated and terminated

in California, and a substantial portion of those packages were transported by a combination of plane and truck. *Id.* at A-2; F-5-6.

3. Federal Express initiated this litigation after petitioner insisted that the company file tariffs and provide it with information concerning the exact number of California packages that travel solely by truck. Federal Express responded that, given the nature of its operations, including its necessary reliance on flexible and changing scheduling decisions, that information was unobtainable. The CPUC nevertheless persisted in its demands, claiming that it could properly assert regulatory jurisdiction with respect to Federal Express's handling of these particular packages. The CPUC's powers are extremely broad, covering, *inter alia*, rates, capitalization, credit policies, insurance, permissible geographic areas of operation, and tariff requirements. *Id.* at D-6-9. Federal Express argued that the application of this regulatory scheme to the trucking portion of its integrated air cargo system was barred by the ADA.[2]

The district court, on summary judgment, rejected Federal Express's claim. It first ruled that express preemption was unavailable because Federal Express had not shown that its "intrastate trucking operations are singularly *airline* services." Pet. App. B-6 (citing *Air Transp. Ass'n v. Public Utils. Comm'n*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988)). The district court further held that implied and conflict preemption were inapplicable here because Federal Express "has pre-

[2] Federal Express also challenged the application of the CPUC's regulations on Commerce Clause grounds, claiming that these intrastate regulations would directly and adversely affect Federal Express's national operations and that, therefore, the CPUC's regulations would impermissibly burden interstate commerce. The district court rejected this claim (Pet. App. B-9), but the court of appeals found it unnecessary to reach the claim (*id.* at A-6-7) in light of the preemption ruling under the ADA. The Commerce Clause issue, therefore, is not before this Court.

sented no evidence to demonstrate that Congress viewed Federal Express as an 'integrated air-ground system' whose operations should be considered under the single rubric of air carrier." Pet. App. B-9.

The court of appeals reversed. Focusing on the ADA's language and its purposes, the court held that "the [statute] as it applies in this case preempts action by the state that regulates the rates and terms of service offered by [Federal Express]." *Id.* at A-5. This holding rested primarily on the court's finding, based on the "undisputed" facts (*id.* at A-2-3), that "[t]he trucking operations of Federal Express are integral to its operations as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system." *Id.* at A-5. The court elaborated: "Every [Federal Express] truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The timing of the trucks is meshed with the schedules of the planes." *Id.* at A-5-6. The court of appeals also emphasized, as noted, that "Federal Express is exactly the kind of an expedited all-cargo service" that Congress had in mind when it enacted 49 U.S.C. § 1302(b). For these reasons, the court concluded, "[t]he [C]PUC's regulation of rates, of discounts and promotional pricing, of claims, of overcharges, of bills of lading and freight bills, and its imposition of fees enters the zone that Congress has forbidden the states to enter." Pet. App. A-6.[3]

Judge Singleton, sitting by designation, dissented. In his view, the preemptive effect of section 1305(a)(1) is limited "to the provision of air transportation." *Id.* at A-8. Starting from that premise, the dissent then con-

[3] The Ninth Circuit further stated that its decision barred the application only of the CPUC's "economic" regulations and "that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express." Pet. App. A-5.

cluded that the operations of an integrated national air cargo service system can be, and should be, divided into those which "are exempt and [those] which are not" (*id.* at A-8), with the controlling factor being simply whether any particular package "see[s] the inside of an airplane." *Id.* at A-8 n.3.

REASONS FOR DENYING THE PETITION

This case presents a narrow issue, correctly resolved by the court of appeals below. The Ninth Circuit, finding that respondent's trucking activity is "integral to its operations as an air carrier" (Pet. App. A-5), properly concluded that state regulation of that activity was regulation of the "rates, routes, or services of [an] air carrier" (49 U.S.C. App. § 1305(a)(1)), and thus preempted. No other federal court has ever ruled on this issue, much less decided it in a contrary manner, and petitioner's arguments notwithstanding, no dire consequences will flow from the decision below. Review by this Court is not warranted.

1. The issue presented to, and decided by, the Ninth Circuit was straightforward and precise: whether the CPUC could impose economic regulation on Federal Express's intrastate use of trucks to transport packages in the company's nationally integrated air cargo system. Given the nature of the services provided by Federal Express, the court of appeals rightly decided that the regulations in question fell within the federal prohibition against state regulation of the "rates, routes, or services of any air carrier." 49 U.S.C. App. § 1305(a)(1). This conclusion follows naturally from both the language and the purposes of the Act.

To begin with, the preemptive language of section 1305(a)(1) applies to state efforts to regulate the "rates, routes, or services of *any* air carrier" (emphasis added). Federal Express is indisputably an air carrier within the meaning of that provision; and its use of

trucks, far from being separate and distinct from its operation as an "air carrier," are (in the words of the court of appeals) "integral to" and "part and parcel of" that air carrier operation. Once that is understood, it follows that the language of section 1305 bars state regulation of all of Federal Express's "rates, routes or services," and not just regulation of its aircraft operations. As the Ninth Circuit put it, by asserting regulatory power over Federal Express's intrastate use of trucks, the CPUC seeks to "regulate[] the rates and terms of service offered by an air carrier." Pet. App. A-5.

The contrary view of the statute offered by petitioner effectively seeks to insert the word "airplane" before the words "rates, routes or services," or to change the phrase "any air carrier" to "any air carrier's provision of transportation by air." But if Congress wanted to distinguish regulation of one part of an integrated air cargo system from regulation of another part—permitting the one but not the other—it could easily have included that distinction in the statute. *Compare* 49 U.S.C. App. §§ 1305(a)(2); 1305(b)(1) (establishing explicit statutory exceptions to the preemption coverage of § 1305(a)(1)). The ADA simply does not contain the limiting words that petitioner seeks to insert. Not surprisingly, therefore, petitioner makes no effort to rely on the actual words of section 1305. *See* Pet. 7.[4]

The policies behind the ADA, far from providing any support to petitioner, fully confirm the correctness of the Ninth Circuit's holding. In particular, section 1302(b) of the statute, which petitioner fails to mention, expressly embodies Congress's policy of encouraging the development

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[4] Petitioner's proposed language is very different, of course, from the statutory language referring to "any air carrier having authority under subchapter IV of this chapter to provide air transportation," which simply means a federally certificated air carrier. 49 U.S.C. App. § 1305(a)(1).

of an "expedited all-cargo air service *system*" (§ 1302 (b)(1) (emphasis added)) to further three important national goals—the needs of shippers, national commerce, and national defense. Unlike air passenger transportation, moreover, Congress expected that such an all-cargo system would be "an integrated transportation system" (§ 1302(b)(2)), one that would necessarily require the use of trucks to supplement an elaborate air network. In view of ADA's strong preference for such air cargo systems, it seems inconceivable that Congress would nevertheless intend preemption to apply or not apply depending on how each individual package actually moves, rather than on the operational nature of the entire "integrated transportation system." *Ibid.*[5]

On the contrary, the package-by-package preemption rule urged by petitioner would plainly undermine the efficiency and effectiveness of a national air cargo system. Thus, under petitioner's approach, Federal Express would be forced into one of two options: it could revamp its entire California system in order to isolate some portion of its intrastate transportation, advising those particular customers that they—unlike their neighbors—would have to pay different rates and be subject to different terms and conditions; or it could use an airplane as part of the delivery of every package in California, even though that would disrupt the efficiency and effectiveness of its national operations. It is wholly illogical to think that Congress, which broadly preempted state regulation in an effort to encourage efficient national air cargo systems,

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[5] The express inclusion in section 1302(b) of the ADA of these policies favoring air cargo systems makes irrelevant the fact that the "legislative history of § 1305(a)(1) is bereft of any reference to ground transportation." Pet. 10 (citing reports). Indeed, that silence notwithstanding, even petitioner recognizes that section 1305 must apply to the large amount of "ground transportation" that takes place when a particular package also travels by air. *Id.* at 9-10.

nevertheless intended for state regulation to force such inefficiencies.[6]

Ignoring these fundamental points, petitioner chooses instead to challenge the decision below by mischaracterizing it. Thus, according to petitioner, the decision would protect "activities having little or no relationship to air transportation" (Pet. 6), so that a State would be powerless to regulate Federal Express even if it used its trucks to operate a "florist or pizza business in San Francisco." *Id.* at 6 n.4 (quoting Pet. App. A-10). The opinion, however, could not be more clearly to the contrary. As the court of appeals explained, the reason that the CPUC's regulation of Federal Express is preempted here is that Federal Express's trucking activities are "integral to" the operation of its national air cargo system; on the other hand, such preemption would *not* be available if Federal Express were to use its trucks for "some separate business venture." Pet. App. A-5.

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[6] Petitioner also suggests that its reading of section 1305 is bolstered by several provisions of the Motor Carrier Act of 1980, 49 U.S.C. § 10101 *et seq.*—in particular, the provision leaving to the states the power to regulate intrastate motor carriage. Pet. 10. Those general provisions in a statute addressed to federal motor carrier regulation, however, cannot be read to displace the specific preemptive provision of a separate statute, the ADA, which was indisputably intended to apply to air cargo systems. By the same token, petitioner's reliance (*id.* at 10-11) on the sections of the Motor Carrier Act that bar the *Interstate Commerce Commission* from regulating transportation by a combination of air and motor vehicle (49 U.S.C. § 10526(a)(8)(B)), or by a motor vehicle when it is used in lieu of an airplane during emergencies (*id.* § 10526(a)(8)(C)), is misplaced; those sections are not an affirmative indication that Congress intended the *States* to be able to regulate every other form of truck transportation regardless of context. Rather, Congress's intent on that broad question must be discerned by examining other statutes—such as the ADA—that expressly tie the use of trucks to other federal concerns—such as the promotion of an integrated air cargo system.

In sum, the "integral-to" standard adopted by the court of appeals for determining whether the use of trucks by an air cargo system comes within section 1305(a)(1) is both sensibly and carefully drawn; indeed, it literally echoes Congress's expressed desire to foster the development of "integrated transportation system[s]" to provide national air cargo service. 49 U.S.C. App. § 1302(b)(2). Such a standard thus correctly reads the ADA's preemption provision to go as far as, but no further than, that which is necessary to protect the full range of activities by an air cargo system operating as Congress contemplated that it would.

2. Petitioner suggests both that this case raises broad issues concerning "the preemptive reach of § 1305(a)(1) [of the ADA]" (Pet. 6), and that it resolves those issues in a manner which is inconsistent with the rulings of other courts of appeals (*id.* at 8-9 (citing cases)). Petitioner is wrong on both counts. The decision below, read without improper exaggeration, is neither sweeping in scope nor in conflict with the decision of any other court.

In the first place, the decision in this case simply does not establish a broad, general rule regarding the scope of preemption under the ADA. On the contrary, the court of appeals limited its ruling to a narrow, fact-bound question: whether a particular air cargo carrier's use of trucks was sufficiently integrated with its overall air delivery system to warrant preemption.[7] That ruling

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[7] The truly limited nature of the Ninth Circuit's ruling is highlighted by the fact that the parties here agree on most of the possible questions relating to the ADA's preemption of activities by air cargo systems. Thus, petitioner acknowledges that it may not apply its trucking regulations to the overwhelming majority of Federal Express's trucking activities—*i.e.*, those involving packages that also travel by air. On the other hand, Federal Express recognizes that if it uses its trucks for "some separate business venture" (Pet. App. A-5), that activity would not be preempted. In addition, Federal Express also concedes that California may properly apply

does not purport to, and does not in fact, resolve any other preemption questions under the ADA—such as those presented by the two cases in which petitions for certiorari are currently pending in this Court: *i.e.*, whether the States can regulate deceptive airline price advertisements (*Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S. Ct. 307 (1990), *reaff'd after remand*, No. 70-8387 (5th Cir unpublished, Jan. 18, 1991), *cert. pending*, Nos. 90-1604 and 90-1606); and whether the States can impose state law remedies for an airline's failure to provide carriage as a result of overbooking (*West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *cert. pending*, Nos. 91-505 and 91-734). Indeed, even petitioner notes that the *Morales* case raises a "preemption question . . . *distinct from that presented here.*" Pet. 6 n.5 (emphasis added).

Just as the decision below establishes no broad principle, it also cannot fairly be read to be in conflict with any other decision, because no other court has ever ruled on any preemption issue regarding the use of trucks by a national air cargo carrier.[8] The cases that petitioner relies on to suggest otherwise are simply inapposite. (Curiously, having said that the issue in *Morales* was "distinct from that presented here" (*ibid.*), petitioner nevertheless goes on to cite that case as being at odds with this one (Pet. 9)). Petitioner's cases, in fact, involve an

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its "general traffic laws" and "its safety requirements for trucks on its highways" to all Federal Express trucks, even if they carry *only* packages that also move by air.

[8] In 1986, the Tennessee Public Service Commission issued an order requiring Federal Express to apply for a certificate of convenience and necessity to operate as an intrastate motor carrier. Federal Express challenged that order in federal court proceedings that were ultimately dismissed on abstention grounds. *Federal Express Corp. v. Tennessee Public Service Comm'n*, 925 F.2d 962 (6th Cir.), *cert. denied*, 112 S. Ct. 59 (1991). The merits of Federal Express's claims, including its argument under the ADA, were never addressed by any court.

entirely different issue of statutory interpretation under section 1305(a)(1). In this case, the court of appeals interpreted the words "rates, routes or services of any air carrier," holding that those words apply to all of the "rates, routes or services" of Federal Express's integrated air-trucking operation, and not just the "rates, routes or services" for those packages that travel by air. In the cases cited by petitioner, on the other hand, there was no dispute about the meaning of the term "rates, routes or services"; rather, the statutory language at issue in those cases was the term "relating to"—a point that petitioner itself makes in each of the parentheticals describing these cases (*see* Pet. 8-9)—and the dispute was over how narrowly or broadly to read that language. But even under the narrowest possible reading of the words "relating to," petitioner's effort to regulate Federal Express's rates and services directly does not merely "relate to" such rates and services, but actually seeks to dictate them.[9]

3. Finally, the Ninth Circuit's decision will not lead to the dire consequences that petitioner predicts. Most

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[9] Petitioner's reliance (Pet. 12) on *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), is also misplaced. In that case, Congress had treated "environmental regulation and land use planning as generally distinguishable" (*id.* at 588), barring state regulation of the latter, but not the former. Given that distinction, this Court ruled that, because of the State's "identification of a possible set of [regulatory] conditions not preempted by federal law" (*id.* at 589), it would be inappropriate to insist that all state regulation was preempted on its face.

In this case, by contrast, the CPUC does not deny that it seeks to regulate Federal Express's "rates . . . or services," which it is barred from doing by the ADA if, as the court below found, those are rates and services of an air carrier. Thus, while petitioner asserts that "Federal Express will be accorded . . . variances from any economic regulatory requirements [of the CPUC] which unduly burden its operations" (Pet. 11 (citations omitted)), that assertion is besides the point here, because *all* regulation—not just some—of Federal Express's rates and services is statutorily preempted.

obviously, petitioner is incorrect in arguing that the court of appeals' decision "threatens the ability of the states to protect public safety." Pet. 7; *see also id.* at 12, 13. The opinion below flatly says otherwise, making clear that "it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express" (Pet. App. A-5) and concluding that this concession by Federal Express reflects a correct view of the law. *See id.* at A-6 (distinguishing safety from economic regulation); and *id.* at A-7 ("Congress has freed [Federal Express] from the constrictive grasp of *economic* regulation by the states") (emphasis added). It is simply not possible, therefore, to say that the State of California will be unable "to protect public safety."

Petitioner also raises the spectre that the decision will have an "anticompetitive impact" by "undermin[ing] the regulatory goals of California's pro-competitive program." Pet. 13. As an initial matter, that is a curious argument to make in the context of the ADA. After all, Congress decided to exempt federally certificated all-cargo air systems from state regulation precisely because it wanted "*competitive market forces* to determine the extent, variety, quality, and price of such services." 49 U.S.C. App. § 1302(b)(2) (emphasis added); *see id.* at § 1302(a)(4). Congress, in other words, apparently disagreed with petitioner's view that competition for integrated air cargo services is better promoted by regulation than by the free market.[10]

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[10] The wisdom of Congress's view, while not at issue here, is nonetheless borne out by the facts of this case. Thus, the CPUC never explains why its regulations, rather than the marketplace, are likely to be more procompetitive. In fact, precisely the opposite would appear to be true. If Federal Express's current service is particularly appealing to consumers—*e.g.*, its rates are low—then state regulatory efforts will *harm* competition by making this desirable option unavailable; and if Federal Express's service is rela-

Petitiioner's specific concerns about unfair competition are similarly off the mark. Thus, petitioner complains that, absent its regulatory authority, Federal Express will be able to engage in "discriminatory practices" and "give preferences to some shippers and not to others." Pet. 13. But the ADA expressly states that air cargo systems like Federal Express must provide their services "*without* unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing." 49 U.S.C. App. § 1302(b)(3) (emphasis added). Petitioner cannot legitimately be heard to complain that Congress assigned the responsibility for administering those requirements to the United States Department of Transportation, with its *national* perspective on federally certificated air cargo systems.

The CPUC's argument that the Ninth Circuit's decision "invite[s] years of burdensome litigation" (Pet. 7; *see also id.* 14) is equally unpersuasive. As noted, the issue presented in this case has not generated litigation in the past; and, in the unlikely event that it should do so in the future, other courts will then have an opportunity to consider the issue—a process that is generally a prerequisite, for sound prudential reasons, to this Court's consideration of an issue. Nor does the decision below fail to provide a "clear standard for ascertaining when preempted economic regulation becomes permitted non-economic [*i.e.*, safety] regulation." Pet. 14. The answer to that question is patently clear: when the CPUC seeks to regulate the safety features of Federal Express's trucks and the safety standards applicable to its drivers, the CPUC's regulatory efforts are permissible. But when, as here, the CPUC seeks to regulate the "rates and terms of service" (Pet. App. A-5) of an integrated air cargo system like Federal Express, its efforts are preempted.

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tively unattractive—*e.g.*, the rates are too high—market forces will lead consumers to select other delivery companies regardless of whether Federal Express is regulated by the CPUC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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